IN THE

# United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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| SANTA CRUZ DEVELOPMENT COMPANY, *Appellant,* v. CORNELIUS C. WATTS *et al.*, *Respondents.* | In Equity. No. 2719. |

## SUPPLEMENTAL BRIEF OF MR. VROOM FOR THE APPELLANT.



New York:
Stillman Appellate Printing Co.
1916.

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## SUPPLEMENTAL BRIEF OF MR. VROOM ON BEHALF OF THE APPELLANT.

### Statement of the Case.

This is an appeal by the Santa Cruz Development Company, one of the defendants below, from the whole decree of the United States District Court of Arizona in a suit brought by Messrs. Watts and Davis, as complainants, to reform a certain deed, dated January 8, 1870, which was alleged to have conveyed to their predecessor in title, one Christopher E. Hawley, the tract of land here in litigation, Baca grant No. 3.

From the decree of the court below it might be inferred, that the bill of complaint filed in this case was one to con-

strue a deed so as to create a legal title in the complainants to the tract of land in dispute, and to quiet the title thus created; but by the allegations of the bill, on which recovery must be had, if at all, it was one to reform a deed on the ground of mutual mistake of the parties to it; and the better practice will be found to be to decide the case on matters alleged in the bill that are within the jurisdiction of a court of equity, rather than those that simply embody the desires and expectations of the complainants.

The title to the tract of land here in litigation rests upon the sixth section of the Act of Congress of June 21, 1860 (12 Stat. 71) by which Congress granted to the heirs of Luis Maria Baca the power to select and locate, in lieu of the grant of Las Vegas Grandes, which had been made to them by the Republic of Mexico, an equal quantity of land, to be located in not more than five tracts, in a square form, on vacant and non-mineral lands within the Territory of New Mexico, within three years from the approval of the said statute. The area of the grant of Las Vegas Grandes was found on survey to contain 496,446.96 acres, so that the area of each of the five locations to be made by the said heirs of Baca was 99.289 acres.

On June 17, 1863, the heirs of Baca selected and located the tract of land, designated as Location No. 3, the grant here in controversy, on lands now lying within the County of Santa Cruz, in the State of Arizona, particularly described as follows:

> "Commencing at a point one mile and a half from the base of the Salero Mountain in direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles thirty-six chains and forty-four links; thence east twelve miles thirty-six chains and forty-four links; and thence north twelve miles, thirty-six chains and forty-four links to the point of beginning."

which said selection and location was, on April 9, 1864, approved by the Commissioner of the General Land Office, and ordered to be surveyed.

On May 1, 1864, the said heirs of Baca conveyed this tract of land to John S. Watts.

The land not having been surveyed, the said Watts, on April 30, 1866, made application to said Commissioner to amend the said location of June 17, 1863, alleging that a mistake was made in the initial point of that location, and asked that the surveyor general be authorized on the survey to change the initial point so as to "commence at a point three miles west by south from the building known as the Hacienda de Santa Rita" giving a description by metes and bounds of the amended location.

On May 21, 1866, the said Commissioner approved the amended location, and returning to the surveyor general the original instructions for survey of April 9, 1864, he instructed him to "cause the survey to be executed in accordance with the amended description of the beginning point, which is described in Mr. Watts' application of April 30 last, provided by so doing the out-boundaries of the grant thus surveyed will embrace vacant land not mineral."

The amended location not having been surveyed, the said Watts, on January 8, 1870, in consideration of one dollar, remised, released, and quit claimed to Christopher E. Hawley,

> "All that certain tract, piece or parcel of land situate, lying, and being in the Santa Rita Mountains, in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Baca by the United States, and by the said heirs conveyed to the party of the first part by deed dated May 1, 1864, bounded," &c.

Giving by metes and bounds the description of the amended location of April 30, 1866.

> "the said tract of land being known as location No. 3 of the Baca series."

The respondents, Mess. Watts and Davis, the successors to title to said Hawley, allege in their bill of complaint, that there was a mistake of law by the Government, by Watts and by Hawley, as to the legal effect of the amended location of April 30, 1866; and that by the deed of January 8, 1870, the interest in land that Watts intended to convey, and did convey to Hawley was Baca grant No. 3, as located on June 17, 1863, and not as amended on April 30, 1866, and they prayed that the said deed of January 8, 1870, be decreed to convey to said Hawley the original location of June 17, 1863, of Baca grant No. 3; and that all the defendants be forever foreclosed from making any claim to the said land or any portion thereof.

On September 30, 1884, the heirs of said John S. Watts and one David W. Bouldin executed an instrument in writing by which the said heirs "granted, bargained, and sold" to said Bouldin Baca grants Nos. 2, 3, and 4. No evidence was adduced on the hearing below to prove that the said heirs had any title to the grants Nos. 2 and 4, and with regard to Baca grant No. 3, which was described by the metes and bounds of the original location of June 17, 1863, the instrument recited:

> "Also location No. 3, which was located under and by virtue of the aforesaid 6th section of an act of Congress passed June 21, 1860. Said location was heretofore duly surveyed in accordance with the provisions of said act, and the field notes returned to the proper office, but the surveyor general disapproved of the same as being located on mineral lands."

The consideration moving from the said Bouldin was, that as speedily as possible, at his own cost, he would cause

the alleged imperfect title to the said Baca grant No. 3, to be perfected by the United States, or other land or land certificates to be granted in lieu of it by the Government; and, in either event, the said Bouldin was to have a two-third, and the Watts heirs a one-third interest in such perfected location, or other land or land certificates granted in lieu thereof.

The defendants, the legal representatives of said David W. Bouldin pleaded in their answer and cross bill, that the said instrument of September 30, 1884, was a deed, and conveyed to the said Bouldin, his heirs and assigns, a fee simple title to two-thirds of Baca grant No. 3, as located on June 17, 1863; and that by reason of deeds of partition executed by and between said Robinson and certain heirs of said Bouldin they were the owners of the north half of said grant, and prayed that it might be confirmed to them.

The defendant Joseph E. Wise pleaded in his answer and cross bill, that the title to the said tract of land so as aforesaid alleged to have been conveyed to the said Bouldin vested in him by sundry deeds and proceedings at law, and he prayed that the said title be confirmed to him. The said Wise and Margaret W. Wise also claimed that each was entitled to an undivided 1/38 of the said grant by reason of certain deeds from the heirs and legal representatives of one Antonio Baca, an alleged son and heir of Luis Maria Baca.

## POINTS OF ARGUMENT.

I. The sixth section of the statute of June 21, 1860, and the action of the commissioner of the General Land Office of April 9, 1864, in pursuance thereof, in approving the selection and location of Baca grant No. 3 by the heirs of Luis Maria Baca made on June 17, 1863, and in ordering its survey, vested in the said heirs an indefeasible, legal title to the tract of land so by them selected and located.

II. The deed of January 8, 1870, by John S. Watts to Christopher E. Hawley conveyed specifically by metes and bounds the attempted amended location of April 30, 1866, to Baca grant No. 3. It did not convey specifically by metes and bounds the original location of June 17, 1863; therefore it must have conveyed either a conditional or equitable title to said grant, or it conveyed nothing.

III. If the bill was filed to reform the deed of January 8, 1870, under which the respondents, Watts and Davis, claim title, because of mistake, it cannot be maintained, no proof having been offered by the said respondents on the hearing to sustain the allegations of their bill, and, on that ground, the bill should have been dismissed.

IV. If the bill was filed to have the court, sitting in equity, construe said deed of January 8, 1870, the court had no jurisdiction to do so, except as incidental to the administration of equitable relief, and as none was alleged in the bill excepting the reformation of said deed because of mistake, the bill should have been dismissed for want of jurisdiction.

V. If the bill was filed to quiet the title to the land in dispute, it should have been dismissed for want of jurisdiction, because the complainants did not allege nor prove that they had the legal title to, nor possession of the said land. The court could not in this suit construe the deed conveying an equitable title to the land in controversy so as to create a legal title to it in the complainants, and having done that, in the same suit, quiet the title to the land thus decreed to be a legal title. The bill was, in this respect, multifarious, and should have been dismissed on that ground.

VI. The decree of the District Court being, in effect, by paragraph 6, that the tract of land here in litigation was segregated from the public domain on December 14, 1914; and the complainants having filed their bill on June 25, 1914, the bill should have been dismissed on the ground, that while the fee simple title to, and possession of, said land was in the United States, no suit could be brought by the complainants to establish their legal title to said land.

VII. The only remedy for the complainants on the facts alleged in their bill would be, after December 14, 1914, to file their bill to have the court decree, that the person to whom the patent for Baca grant No. 3 issued or enured on said date, in this case by the decision of the Supreme Court in Lane vs. Watts, supra, the appellant, the Santa Cruz Development Company, the legal representatives of the heirs of Luis Maria Baca, the original grantees, held the said land in trust for them.

VIII. The right of the complainants below to demand this relief, under the allegations of their bill, would rest upon an estoppel operated by the so-called bond from John S. Watts to William Wrightson, dated February 2, 1863, in pursuance of which the said deed from the said Watts to said Hawley of January 8, 1870, is alleged to

have been executed. But no estoppel was operated, because the complainants failed to prove on the hearing, that the said bond was assigned to their grantors or to them; or that the said deed of January 8, 1870, was executed in pursuance of said bond; or that by the said bond or by the said deed it was agreed by the said Watts to convey, or that he conveyed to the said Hawley the legal title to the land in dispute—the original location of Baca grant No. 3 of June 17, 1863.

IX. The said deed of January 8, 1870, conveyed to the said Hawley no right, title, or interest to the said original location of June 17, 1863, by reason of the fact that the tract of land—the attempted amended location of 1866—particularly described in said deed, to some slight extent overlaps the original location of June 17, 1863, to which the grantor, Watts, then had the legal title.

X. The instrument of writing executed by and between the heirs of John S. Watts and David W. Bouldin, dated September 30, 1884, under which James E. Bouldin, Jennie N. Bouldin, Joseph E. Wise, Lucia J. Wise, and W. G. Rifenburg, defendants below, claim title to the land in dispute, was not a deed but an executory contract, and being a contract that related solely to property which had no actual or potential existence, it was nudum pactum and void.

XI. The grant from the United States to the heirs of Luis Maria Baca by the sixth section of the act of June 21, 1860, was exclusively to "the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas," and did not embrace heirs of the said Baca who did not "make claim" to the surveyor general of New Mexico or to the Congress pursuant to the Statute of September 30, 1854, and the regulations made thereunder.

## POINT I.

**The sixth section of the Statute of June 21, 1860, and the action of the Commissioner of the General Land Office of April 9, 1864, in pursuance thereof, in approving the selection and location of Baca grant No. 3 by the heirs of Luis Maria Baca made on June 17, 1863, and in ordering its survey, vested in the said heirs an indefeasible legal title to the tract of land so selected and located.**

The Supreme Court in the case of *Lane v. Watts* (234 U. S., 524) involving the title to Baca grant No. 3, the land here in dispute, said on the motion for a rehearing (235 U. S., 20):

> "The opinion is explicit as to the main element of decision. It decides that the title to the land involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in pursuance of the act of 1860."

This opinion presents for the consideration and determination of the Court the question, what title to the land granted is to be understood to then have passed to the heirs of Baca under this decision of the Supreme Court of the United States?

The title to this grant rests upon the sixth section of the act of June 21, 1860 (12 Stat. 71), which reads as follows:

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number," * * *

Congress had, by the third section of the said act, confirmed the grant of Las Vegas Grandes to the town of Las Vegas, and, in consideration of the heirs of Baca waiving their older and better title to the land thus confirmed, had granted to the said heirs, by the sixth section, the power in land from which sprang Baca grant No. 3.

The Supreme Court, in the case of *Maese v. Herman*, 183 U. S., 581, held that the third section of the said Act of 1860 confirmed the grant of Las Vegas Grandes to the town of Las Vegas, and not to the heirs of Baca. The language of the Court is:

> "Congress accommodated the dispute" (to the title of said grant) "by a magnificent donation of land to the heirs of Baca, and confirmed the original grant to the town."

Thus the grant to the heirs of Baca was not a confirmation by Congress of the pre-existing Mexican grant of Las Vegas, but a grant *de novo* by Congress of a part of the public domain.

This grant was a present grant, although it is expressed as a power, which the grantees were empowered to exercise at their option. If they, in compliance with the provisions of the act, located an equal quantity of other lands within three years, they became possessed of it, not by some future act of Congress, but by this act.

In creating this power in land, the parties concerned in it were the *donor*, who conferred the power, the *donee*, who executed it, and the *appointee*, or person in whose favor the power was executed. In this case the United States were the donors, the heirs of Baca the donees, and they were also the appointees. Mr. Sugden (*On Powers*, 82) defines a power to be an authority enabling a person to dispose, through the medium of the Statute of Uses, of an interest vested either in himself or in another person. 4 *Kent's Com.*, 316.

The power thus granted was not merely a title, but an actual estate for a term of three years. After the heirs of

Baca had made the selection and location of the land contemplated by the sixth section of the Act of 1860, in other words, after they had executed the power, and the Government had approved that execution, the use in fee simple became and was an actual estate in fee simple by the operation of the Statute of Uses. (*2 Wash. Real Prop., Sec. 1653; 4 Kent's Com., 334, 337*). These very acts constituted the execution of the power, and the reversion of the United States was thereby defeated.

If this transaction had been one between individuals, the title thus acquired would have carried with it the possession of the land without livery of seizin; but it was one between the United States and the heirs of Baca, and in such case the strict legal title would not pass and possession would not vest, until segregation of the land by survey, and the issuance of a patent or its equivalent, unless the granting statute contained words of present grant (*Schulmberg v. Harriman,* 21 Wall, 44; *Iowa R. R. Co. v. Blumer,* 206 U. S., 491); or was in confirmation of a subsisting grant made in ceded territory by some foreign power. *Stoneroad v. Stoneroad,* 158 U. S. 240.

The Supreme Court says, in *Bagnell v. Broderick,* 13 Pet., 450:

> "Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title, until its issue the fee is in the Government; by the patent it passes to the grantee, and he is entitled to recover possession in ejectment."

*Wilcox v. Jackson,* 13 Pet. 516.
*Langdon v. Sherwood,* 124 U. S. 83.
*Hussman v. Durham,* 165 U. S. 144.
*Carter v. Ruddy,* 166 U. S. 495.
*Michigan Land Co. v. Rust,* 168 U. S. 502.

In this case the statute under which the grant was made required that the selections and locations should be approved by the Commissioner and be surveyed by the surveyor general. The instructions of the Commissioner in this regard are set forth at length in *Lane v. Watts,* 41 App. D. C. 130. For the present purpose it is only necessary to state, that the selection and location of Baca grant No. 3, made by the heirs of Baca on June 17, 1863, was approved and ordered to be surveyed by the Commissioner on April 9, 1864. In his communication to the surveyor general of New Mexico the Commissioner says:

> "In order to avoid delay you are hereby authorized, whenever said claimants shall pay or secure to be paid to you a sum sufficient to liquidate all expenses incident thereto, to contract with a competent deputy surveyor and have the claim numbered 3 of the series surveyed as described in the enclosed application. *Transcript of the field notes and plats certified in accordance with the law will be transmitted to this office and will constitute the muniments of title, the law not requiring the issue of patents on these claims.*"

From these considerations, we can reach but one conclusion, namely, that when the Supreme Court said in *Lane v. Watts, supra*, "that *the* title to the land involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for in pursuance of the Act of 1860," the Court must be held to have meant the legal title that arose by the execution of the power granted by the sixth section of the Act of 1860, which alone created it, and which vested *an* indefeasible, legal title in the heirs of Baca, and destroyed the reversion of the United States. *The* legal title, that is, the strict fee simple title which imports possession (Green v. Leiter, 8 Cranch 242) remained in the United States until survey, which survey "will be transmitted to this office and will constitute the muniments of title, the law not requir-

ing the issue of patents on these claims."—Commissioner's Order of April 9, 1864.

On May 1, 1864, the heirs of Baca conveyed to John S. Watts, the mediate grantor of the appellant, the Santa Cruz Development Company, Baca grant No. 3.

This grant not having been surveyed in 1866, the said Watts, on April 30th, of that year, applied to the Commissioner of the Land Office, and requested that the original location might be amended, and that on the survey of the grant "the surveyor general of New Mexico be authorized to change the initial point so as to commence at a point three miles west by south of the building known as the Hacienda de Santa Rita, running thence," etc., giving a description of the proposed amended selection by metes and bounds.

To this application the Commissioner, on May 21, 1866, replied, returning to the surveyor general the original instructions issued on April 9, 1864, for the survey of the location of June 17, 1863, with directions that he "cause the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watt's application of 30th April last, *provided by so doing the out boundaries of the grant thus surveyed will embrace vacant lands not mineral.*"

On May 21, 1866, when the Commissioner approved and ordered the survey of the amended location of April 30, 1866, John S. Watts had an indefeasible, legal title to the original location of June 17, 1863. Assuming that the Commissioner had the power to authorize the amendment of that location and order its survey, Watts could acquire in such amended location only a conditional interest, dependent on the subsequent survey which was to determine whether *"the out boundaries of the grant thus surveyed will embrace vacant lands not mineral."* The survey having been made, it must have been approved by the Commissioner to vest a legal title to the land in Watts. The

order itself did not vest in him any present right or title to the land, but only a contingent interest in it—an interest not assignable at law, and one which equity would not enforce until the happening of the contingency.

*Story Eq. J.* Secs. 1040, 1040b.
*Pom. Eq. J.* Secs. 1285, 1292.

Watts having thus an indefeasible, legal title to the original location of 1863, and a conditional estate or title in the amended location of 1866, on January 8, 1870, he conveyed to said Hawley the amended location of 1866, particularly describing it by metes and bounds. The conveyance was by a quit claim deed.

The rule of law is, that every man who has a full knowledge of the facts is presumed to understand his legal rights, and this rule is as much respected in courts of equity as it is at law.

*Hampton v. Laytin,* 18 Wend. 413, and cases cited.

Thus Watts knew that he had *a* legal title to the original location of 1863; and under this rule of law it must be presumed that he also knew that he had only an equitable or contingent interest in the amended location of 1866. His deed from the heirs of Baca of May 1, 1864, was of record, and notice to Hawley, who also had knowledge of the amended location of 1866 by the deed of 1870 specifically conveying it to him. If that amended location had been surveyed by the surveyor general of Arizona, and subsequently approved by the Commissioner of the General Land Office, that would have vested an indefeasible, legal title to the amended location in Hawley. Would a court of equity, in these circumstances, have listened to Watts asserting, that by his deed of 1870 to Hawley, which specifically described, by metes and bounds, the amended location of 1866, he intended to and did convey the original location of 1863; that the determinative description of the land conveyed was not in the

particular description by metes and bounds, but in the words "Known as Baca Location No. 3."

The Supreme Court well says in *Russell v. Transylvania University,* 1 Wheat. 432:

> "If the vendee may set up such a ground of equity the vendor may do the same."

Hawley was not a *bona fide* purchaser without notice of the fact that he was purchasing an equitable or conditional estate. He was a speculative purchaser, and was willing to accept a quit claim deed from Watts, which was equivalent to notice that there were outstanding equities, and that Watts was only willing to place him in the same position he held with reference to the tract of land specifically conveyed.

*Hastings v. Niser,* 31 Fed. 597.
*Johnson v. Williams,* 37 Kans. 179.
*Sherwood v. Moelle,* 37 Fed. 478, S. C. 148 U. S. 29.

## POINT II.

**The deed of January 8, 1870, by John S. Watts to Christopher E. Hawley, conveyed specifically, by metes and bounds, the attempted amended location of April 30, 1866 to Baca grant No. 3. It did not convey specifically, by metes and bounds, the original location of June 17, 1863, therefore it must have conveyed either an equitable title to the said grant, or nothing.**

An indefeasible, legal title to the land granted on April 9, 1864, designated and known as Baca grant No. 3, having passed from the United States and vested in the heirs of Baca, that government could exercise no further control over it, save in survey under the Act of June 21, 1860, and patent.

This was decided by the Land Department and by the Supreme Court of the United States.

On June 15, 1882 (5 L. D. 705) the Secretary of the Interior decided respecting this grant, that:

> "It is conceded that a selection was made, the location designated and approved by the surveyor general June 17, 1863, agreeable to the provisions of the act. It appears that this selection was amended upon application made therefore April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that the instruction for the survey of the location as amended was issued by your office May 21, 1866—the claimant must be held to this selection and location, and cannot be allowed to relocate other land in lieu of it."

Here, from the context, "this selection and location" can only refer to the selection and location of 1863. That tract of land was the only one that had been selected and located, because the location had been approved and ordered surveyed by the Commissioner; while the land embraced in the amended location had been selected and designated, it had not been located, because, by the order of the Commissioner of May 21, 1866, the location of it depended upon a survey which had not been made by the government, and which, under the said order, was to be depended for its legal effect upon the character of the land surveyed.

It would be *reductio ad absurdum* to say, that the Secretary in reversing the decision of the Acting Commissioner, based upon the admitted fact, that the lands of the amended location of 1866 were mineral, and that thus the location was void, decided that the grant claimant must be held to that void amended location. What the Secretary decided was, that the claimant must be held to the location of 1863, and to the amendment to it conditionally allowed by the Commissioner, if, upon survey,

the lands thus selected should prove to be vacant and not mineral. The practical effect of the decision, accepting the statement of Robinson that the land of the amended location was mineral, was to nullify the amended location and to hold the grant claimants to the original location of 1863.

This decision of the Secretary was made in reviewing and reversing that of Acting Commissioner Harrison, who had decided that Baca Float No. 3 could be re-located because, on the showing of the grant claimant, Robinson, *the amended location of 1866* was void, because it had been made on mineral lands, and thus was in contravention to the provisions of the 6th Section of the Granting Act of June 21, 1860. It is significant, that both Robinson and the Acting Commissioner regarded the amended location of 1866 as the legal title to Baca grant No. 3, and not as a mere contingency, as it was—and this is the mistake, one of law, and unilateral, that Hawley, and each and every of his successors in title made respecting it, until the respondents, Messrs. Watts and Davis, as trustees, evolved from their inner consciousness the thought, that the said deed of January 8, 1870, conveyed to their mediate grantor, Hawley, not the amended location of 1866, therein specifically described by metes and bounds, but the original location of 1863, an entirely different tract of land, which was not specifically, or in any other manner, described by the said deed.

Notwithstanding this definitive decision of the Secretary, the various grantors of the respondents, Messrs. Watts and Davis, persisted in asserting their legal title to the attempted amended location of 1866. Robinson, Cameron and finally Alexander F. Matthews, were not only insistent, but vociferous.

On December 21, 1888, Robinson applied to the Commissioner to direct a survey of the lands of Baca Float No. 3, *as amended in 1866,* which application was denied on March 5, 1889 (Record ). This decision was affirmed

on appeal by the Secretary in July, and a motion for rehearing was denied.

On June 22, 1892, Robinson and the grantees of D. W. Bouldin, his two sons, agreed to, and did partition, Baca Location No. 3, *as amended in 1866;* and on November 12, 1892, the Bouldins conveyed to Robinson the south one-half, and on November 19 Robinson conveyed to the Bouldins the north half of the said location *as amended in 1866.*

On December 1, 1892, Robinson conveyed to John W. Cameron the south one-half of the said *amended location,* reciting that he derived his title from the partition with the Bouldins.

On June 9, 1893, the said Cameron applied to the surveyor General of Arizona to survey Baca Location No. 3, *as amended in 1866.* In his application he says:

> "These floats were numbered 1, 2, 3, 4 and 5, all of them was selected in the same manner as was No. 3, the one under consideration. This was approved by the Surveyor-General of New Mexico on the same day it was selected and located, but the survey was never completed. An amended application was filed, and the Land Office on May 21, 1866, issued instructions for the survey as amended. *It is this location that should be surveyed."*

The application concludes as follows:

> "Now, therefore, in accordance with the Act of Congress, and as one of the owners of this claim, Baca No. 3, and representing all of them, I hereby require of you to make survey of said *amended location,* in accordance with the law and your duties thereunder."

On August 14, 1893, the said Cameron appealed from the decision of the Surveyor-General of the Commissioner of the Land Office. This appeal does not seem to have been prosecuted.

On September 22, 1893, Alexander F. Matthews acquired by conveyances from said Robinson, said Cameron, Mrs. A. T. Belknap, James Eldridge and Charles E. Eldridge, all of their right, title and interest in the southern half of the *amended location* of Baca Location No. 3, which had been conveyed to said Robinson by deed of partition from the said Bouldins on November 12, 1892.

On or about May 6, 1899, the said Matthews applied to the Commissioner to survey *the amended location of 1866* to the Baca grant No. 3. This application was denied by the Secretary on July 25, 1899 (29 L. D. 44), the Secretary saying:

> "It was not simply a 'mistake in the initial point' of this selection that was sought to be corrected by the application of 1866, as therein suggested, but a complete change of the selection was thereby asked for, including as well the course of the exterior lines of the claim, as 'the initial point' thereof. Under these circumstances to allow the so-called amended selection to stand would be, in reality, to allow a new selection under the grant after the expiration of the time limited for the exercise of the right of selection, and for this there is no authority found in the statute making the grant or elsewhere. The Department is therefore of the opinion that the grant claimants are bound by the selection of June 17, 1863 and that they cannot be allowed to take under the application of April 30, 1866."

From this decision of the Secretary the said Mathews appealed, asking for a rehearing, stating in his petition, among other things, that from May 21, 1866, when the Commissioner allowed the amended description, to July 25, 1899, when the Secretary decided that such amended description was illegal and void, the Land Department had always recognized and treated the land of the amended description as Baca Location No. 3; that it was con-

sidered by the Government as private land, and as such "passed from grantee to grantee for large considerations"; that "prior to July 25th, 1899, your petitioner sold said property, taking notes for the consideration of the same, secured by mortgage thereon, upon which notes default has been made, largely occasioned by the decisions of July 25, 1899;" that for thirty-three years the Department has never questioned the legality of the allowance of the amended description, it was decided that they were bound by it, and that therefore the Government was estopped from denying such actions in morals, if not in law. The petition concludes with a prayer that the grant claimants be entitled to claim under the amended description of April 30, 1866.

The petition was denied.

The question was finally presented to the Supreme Court of the United States in 1914, and that court decided in *Lane v. Watts,* 234 U. S. 525, and again on a motion for rehearing, 235 U. S. 20, that the legal title to the tract of land, located by the heirs of Baca on June 17, 1863, vested in the said heirs by said location, and its approval by the Land Department and order of survey of April 9, 1864, in pursuance of the Act of June 21, 1860.

In a word, it confirmed the original location of June 17, 1863, under which the appellant, the Santa Cruz Development Company, claims title, and refused to confirm, and thereby rendered void the amended location of April 30, 1866, the title to which was in the grantors of the respondents, Mess. Watts and Davis.

From the above decisions it is evident, that the said Watts by the attempted amended location of April 30, 1866, took no estate, legal or equitable, in the land therein particularly described, and that by his deed to said Hawley of January 8, 1870, he undertook to convey a tract of land to which he not only had no title, but one that had no actual or potential existence. The deed was absolutely void from the day of its date.

To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment.

*Story Eq. J.,* sec. 1040.
*Pennock v. Coe.,* 23 How. 127.
*Jones v. Richardson,* 51 Mass (10 Metc.) 488.
*Howe v. Harrington,* 18 N. J. Eq. 495.
*Hoak v. Long,* 10 Serg. & R. 9.
*Peters v. Condron,* 2 Serg. & R. 80.
*Evans v. Spurgin,* 6 Gratt. 107.

The same rule of law applies to grants made by the State.

*Polk v. Wendell,* 9 Cranch, 87-89.
*Wright v. Roseberry,* 121 U. S. 520.

## POINT III.

**If this bill was filed to reform the deed of January 8, 1870, under which the respondents, Watts and Davis, claim title, because of mistake, it cannot be maintained, no proof having been offered by the said respondents on the hearing to sustain the allegations of their bill, and on that ground the bill should have been dismissed.**

This deed, on its face, presents no ambiguity. It conveys a tract of land, the amended location of April 30, 1866, specifically described by metes and bounds. If it did not correctly describe the land intended to be conveyed by the parties to it, because of fraud, accident, or mistake, a court of equity would, on a proper showing, grant relief.

The bill of complaint alleges, in paragraph seven, a mutual mistake of law by the parties to the deed, and by paragraph eight, the intent of the grantor in executing the deed, and a mistake of fact.

On the hearing no proof was offered by the complainants of either a mutual mistake of law or of fact.

These allegations of the bill were the only ones that gave the court below, sitting in equity, jurisdiction over the case, and in default of proof of them, the court should have dismissed the bill.

These allegations are the jurisdictional facts in the case, and the proofs must agree with the allegations—*Foster v. Goddard,* 1 Black, 518; *Rubber Co. v. Goodyear,* 9 Wall. 793. The recovery must be had upon the case made by the pleadings or not at all. *Grosholz v. Newman,* 21 Wall. 488. A party is not allowed to state one case in his bill and make out a different one by proof, the *allegata* and *probata* must agree, the latter must support the former. *Boone v. Chiles,* 10 Pet. 209.

## POINT IV.

**If this bill was filed to have the court, sitting in equity, construe the said deed of January 8, 1870, the court had no jurisdiction to do so, except as incidental to the administration of equitable relief, and as none was alleged in the bill excepting the reformation of the said deed because of mistake, the bill should have been dismissed for want of jurisdiction.**

The respondents-(complainants) allege in the Eighth paragraph of their bill, that:

> "The said John S. Watts intended to and did convey to Christopher E. Hawley, by the deed of January 8, 1870, Baca Float No. 3, as the same is described in paragraph 2 hereof" (that is, the original location of June 17, 1863) "as appears by the express terms of the said deed," that is, that the said John S. Watts "has remised, released, and quit claimed," &c.,

reciting at length the words of said deed, omitting the particular description of the land, concerning which the allegation reads:

> "and the description by metes and bounds which have been omitted, and stars substituted in its place, was used under the *mistaken belief* existing at the time said deed was made as to the metes and bounds of the Float."

By paragraph Nine it is further alleged that:

> "The foregoing is the *correct construction* to be put on the deed of January 8, 1870, and is supported by the *following facts*—On or about March 2, 1863, the said John S. Watts executed and delivered to one William Wrightson, a title bond for said Baca Float No. 3, and prior to January 8, 1870, the said Christopher E. Hawley had become entitled to and was in possession of said title bond, and entitled thereunder to have a fee simple title to Baca Float No. 3, as described in paragraph 2 hereof, made to him, and the plaintiffs as successors in title to said Hawley, or own and possess said title bond."

On the allegations contained in these two recited paragraphs, the complainants demanded judgment against the defendants:

> "That the deed, dated January 8, 1870, * * * from John S. Watts to Christopher E. Hawley, and described and referred to in paragraph 6 of the complaint herein, *conveyed* to said Hawley, the tract of land in Santa Cruz County, Arizona, known as Baca Float No. 3,"

describing by metes and bounds the original location of June, 17, 1863.

The allegation in the Eighth paragraph of the bill, that the particular description of the land in the deed of January 8, 1870, "was used under the mistaken belief existing

at the time said deed was made as to the metes and bounds of the said Float," was not proved, and must be dismissed from consideration. In any event, it could not be made the foundation for the "correct construction" of the deed, but for its reformation or cancellation.

By paragraph Nine of their said bill the complainants seem to contemplate a "correct construction" of the said deed by reference to a title bond from said Watts to one Wrightson therein recited. But it was not proved on the hearing, that by the said bond the said Watts agreed to convey to the said Wrightson Baca Location No. 3, as located on June 17, 1863; nor that the said bond was assigned to the said Hawley; nor that the said deed of January 8, 1870, was executed by Watts in pursuance of said bond; nor does it appear from the said bond itself that it in any way related to Baca Location No. 3.

Furthermore, the construction of a deed, that is, the determination of a legal title, is not within the jurisdiction of a Court of Equity.

Equity cases under the constitution, the Supreme Court says in *Irvine v. Marshall,* 20 How. 565, are those suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in equity jurisprudence.

The Court of Errors and Appeals of New Jersey, in *Hart v. Leonard,* 42 N. J. Eq. 419, says:

> "No doubt many cases arise in which Courts of Equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can be classified under the following heads—
>
> 1. Cases where the legal right has been established in a suit at law, and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not attainable by legal procedure.

2. Cases where the legal right is admitted, and the object of the bill is the same as in the class just mentioned.

3. Cases where the legal right, though formally disputed, is yet clear, on the facts which are not denied and legal rules which are well settled, and the object of the bill is as before."

Neither these three heads of equity jurisdiction nor the others given, include the construction of a deed so as to establish a legal title.

A court of equity has no jurisdiction to construe a deed, save as such construction may be incidental to the granting of equitable relief. It cannot, in a suit to quiet title, construe a deed for the purpose of establishing a legal title on which, in the suit pending, the complainant might maintain his suit.

"In order to induce action on the part of the court, his own title must be perfectly clear and paramount to the supposed cloud, and he must not be in the situation of bringing an action of ejectment in the Court of Chancery."

*Essex Co. Bank v. Harrison,* 57 N. J. Eq. (12 Dick.) 97.

The Court of Errors say in *American Dock Co. v. Trustees,* in 37 N. J. Eq., (10 Stew.) 271:

"The general rule is that a court of equity has no jurisdiction to establish by its decree the title to lands, its jurisdiction being limited to an interposition to quiet the possession of a party after his title had been determined by a court of law. The principle upon which courts of equity interposed to quiet the title was, that judgments in ejectment, not being conclusive, and operating only to transfer the possession, without conclusively settling the title, a court of equity, after the title had been satisfactorily de-

termined by action at law, would interpose to put an end to further litigation—the *court assuming that the complainants' legal title had already been determined at law,* intervened to prevent a litigation which had become vexatious and oppressive, because unnecessary and unavailing."

See also *Sheppard v. Nixon,* 43 N. J. Eq. (16 Stew.) 633.

The Court of Chancery of New Jersey in *Palmer v. Sinnickson,* 59 N. J. Eq. (14 Dick. Ch.) 535, in a statutory suit to quiet title, say:

"Equity will not, when no equitable question is presented, entertain a suit to declare, as is asked in this bill, that the complainants' title is good, and that the defendants' claim is bad. The determination of the sufficiency of purely legal titles to land, dis-associated from questions of trust or other matters of equitable nature, must be invoked in courts of law."

The same rule obtains in actions of dower. The court says in *Vreeland v. Vreeland,* 49 N. J. Eq. (4 Dick. Ch.) 322:

"But a court of equity will not try a question of legal title, nor decree whether the widow is legally entitled to dower. If the title to dower is disputed, the right must be established at law."

So also in partition.

*Hay v. Estell,* 2 C. E. G. 252.
*Riverview Cemetery Co. v. Turner,* 24 N. J. Eq. (9 C. E. G.) 18;
*Hoyt v. Tuers,* 52 N. J. Eq. (8 Stew.) 363.

The same rule prevails with regard to the construction of wills. The claimant of a purely legal title under a devise, seeking only to establish his title against that of the

heir at law by the construction of the will, must asert his rights at law and not in equity.

In *Torrey v. Torrey,* 55 N. J. Eq. (10 Dick. Ch.) 444, the court says:

> "The generally accepted doctrine is that above declared, and is consistent with the long established rule that the forum in which to settle the legal title to land is a court of law."

Citing and reviewing numerous cases.

A court of equity has no jurisdiction to determine a mere question of legal title.

> *North Penna. Coal Co. vs. Snowden,* 42 Penna. St. 488.
> *Grubbs' Appeal,* 90 Penna. St. 228.

In this case the Court says, on page 233:

> "It is sufficient to say in regard to this, that the proper construction of a deed is not a subject of equity jurisdiction."

And on page 235, that

> "Orders and decrees in equity where there is no jurisdiction, are simply *coram non judice.*"

From the above cited cases, to which many others might be added, it is abundantly established that a Court of Equity has no jurisdiction to determine by construction a mere question of legal title to land, and on this ground the Court should have dismissed the bill for want of jurisdiction.

The objection to the jurisdiction of the Court was not made by the pleadings, nor was it suggested by counsel to the Court on the hearing, but it seems to me to be one of which the Appellate Court, of its own motion, will take notice, and to which it will give due effect.

*Lewis v. Cocks,* 23 Wall. 470.
*Brown v. Lake Superior Iron Co.,* 134 U. S. 535.
*Allen v. Pullman Palace Car Co.,* 139 U. S. 662.
*Minnesota v. Hitchcock,* 185 U. S. 382.

## POINT V.

**If this bill was filed to quiet the title of the complainants to the land in dispute, it should have been dismissed for want of jurisdiction, because the complainants did not allege nor prove that they had the legal title to, or possession of, the said land. The Court could not in this suit construe the deed conveying an equitable title to the land in controversy so as to create a legal title to it in the complainants; and, having done that, in the same suit, quiet the title to the land thus decreed to be a legal title. The bill was in this respect multifarious and should have been dismissed on that ground.**

Bills to quiet title belong to the jurisdiction of Courts of Equity, and when a bill is filed in the courts of the United States, it is governed by the general rules of equity practice.

The legislatures of the states have been allowed to dispense with some of these rules, for instance, with the rule requiring possession in the complainant, and such statutes have been accepted and enforced by the courts of the United States, but the general rules which govern the jurisdiction in equity cannot thus be dispensed with (*Frost v. Spitely,* 121 U. S. 557). In such suits it is always the title, that is to say, the *legal title* to the land that is to be quieted against claims of adverse interests or titles; and as the foundation for the relief sought, the complainant must allege and prove that he has the legal title to the premises (*Holland v. Challen,* 110 U. S. 25; *Dick v. For-*

*aker,* 155 U. S. 414), or as Mr. Justice GREER says in *Orton v. Smith,* 18 How. 265:

> "Those only who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

*St. Louis v. Knapp,* 104 U. S. 658.
*Holland v. Challen,* 110 U. S. 25.
*Frost v. Spitely,* 121 U. S. 557.
*Ely v. N. M. R. R. Co.,* 129 U. S. 293.
*Whitehead v. Shattuck,* 138 U. S. 151.
*Simons Week Coal Co. v. Moran,* 142 U. S. 449.
*Wehrman v. Conklin,* 155 U. S. 325.
*Dick v. Foraker,* 155 U. S. 414.
*2 Story Eq. J.,* §859.
*1 Pom. Eq. J.,* §248, §293.
*Whitehouse v. Jones,* 12 L. R. A. (N. S.) 49.

The complainants below, by paragraph 8 of their bill, alleged that the deed of January 8, 1870, from Watts to Hawley, on its face, conveyed to the latter the legal title to Baca grant No. 3 as originally located on June 17, 1863; and by paragraphs 26 and 28, that by mesne conveyances the tract of land so conveyed was deeded to them, and that they are "the owners" of said tract of land, and in possession of it.

If this suit was designed by the complainants to be one to quiet the title to the land here in dispute, *i. e.* Baca grant No. 3 as located on June 17, 1863, it is clear that the jurisdiction of the United States Court was invoked on the ground that the complainants, having both the fee simple title to, and possession of, the grant, had no adequate remedy at law.

In these circumstances, under the practice in equity prevailing in the courts of the United States, the complainants below, to maintain their suit, must have alleged and proved an established, undisputed, legal title to the tract of land in litigation, and the possession of it. Here the juris-

diction attached solely because of the possession alleged, otherwise the complainants would have had, on their bill, an adequate remedy at law by an action of ejectment. The possession, here the source of jurisdiction, was predicated upon the holding of the legal title. Jurisdiction was not invoked under the statute of Arizona relating to actions to quiet title (Rev. Stat., Section 4104), but under the general equity jurisdiction of the courts of the United States.

Legal title to the land in dispute was not alleged by the complainants in their bill, nor possession, and neither was proved on the hearing.

The allegation respecting title is found in paragraph 26 of the bill, which reads, that

> "On or about February 8, 1907, the said S. A. Syme and the heirs, devisees, and legal representatives of the said Alexander F. Mathews sold and conveyed the land annexed by deed from Watts to Hawley, referred to in paragraph 6 hereof, to the plaintiffs by deed, * * * and ever since February 8, 1907, plaintiffs have been and now are *the owners of said land.*"

This allegation is insufficient. The complainants must allege that they are the owners in fee simple, or of the legal title, or use other words importing the legal title (*St. Louis v. Knapp,* 104 U. S. 658; *Simons Week Coal Co. v. Moran,* 142 U. S. 449). In *Ely v. Rail Road Co.,* 129 U. S. 293, the Supreme Court, in construing the Arizona statute to quiet titles, say:

> "And allegation, in ordinary and concise terms, of the *ultimate fact,* that the plaintiff is the *owner in fee* is sufficient, without setting out matters of evidence, or what have been sometimes called probation facts, which go to establish that ultimate fact."

In *Dick v. Foraker,* 155 U. S. 414, the Court say:

> "The rule in ejectment is that the plaintiff must recover on the strength of his own title, and not on the

weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and *title in the complainant is of the essense of the right to relief.*"

*American Dock Co. v. Trustees,* 37 N. J. Eq. 271.
*Sheppard v. Nixon,* 43 N. J. Eq. 633.
*Essex Nat. Bank v. Harrison,* 57 N. J. Eq. 97.
*Bates' Fed. Procedure,* sec. 129, p. 156.

In fact, at the time the complainants filed their bill, they had neither the legal title to, nor the possession of the land in controversy.

I have above shown, (*ante* p. ) that *a* legal title to Baca grant No. 3, as originally located, vested in the heirs of Baca on April 9, 1864, by the approval of the Commissioner of the selection made by them on June 17, 1863, and that *the* legal title, the strict fee simple title, remained in the United States until the survey of the land had been approved by the Commissioner and filed in the local Land Office of Arizona. This procedure was necessary under the instructions of the Land Department of April 17, 1879, (*Wilson Cypress Co. v. Del. Pozo,* 236 U. S. 648), and operated to vest the fee simple title to the grant in the then grantee of the legal title of the heirs of Luis Maria Baca, viz. the appellant, the Santa Cruz Development Company.

This grant was by Congress; when thus perfected, it vested both the fee simple title and the possession in the grantee. It was tantamount to a conveyance with livery of seizin. *3 Washb. Real Prop.,* sec. 2022; *Green v. Leiter,* 8 Cranch, 249; *North. P. R. R. Co. v. Myers,* 5 Mont. 126.

On the hearing the complainants undertook to prove possession of this grant of land as originally located on June 17, 1863, by the testimony of G. W. Atkinson, their alleged tenant, who claimed to hold possession of eighty acres of fenced land under a lease from the complainants dated June 17, 1914 (R. p. 232). But an examination of the bill demonstrates that such possession could

have been but constructive. It is a principle of universal application that the law never raises a constructive possession against the real owner of the land, *who, at the time of the said lease, was the United States;* and if an entry be wrongful, though it be under a deed, a possession thereby gained will extend only so far as the tenant shall occupy the premises.

*Ewing v. Burnet,* 11 Pet. 41.
*Sabariego v. Maverick,* 124 U. S. 297.
*Gentile v. Kennedy,* 8 N. M. 353.

The question for the decision of the court is not whether under the statutes of Arizona a complainant could, either in or out of possession, maintain a suit to quiet title to land, but whether having pleaded possession as the sole ground of the jurisdiction of the Court below, these complainants have proved it.

The complainants not having pleaded or proved possession of the land in dispute the Court, regarding this bill as one to quiet title, should have dismissed it for want of jurisdiction.

Furthermore, in this respect, that is, the quieting of the title to Baca grant No. 3, the bill is multifarious, and should have been dismissed on that ground. The bill alleges in paragraph 8 that the deed of January 8, 1870, from Watts to Hawley, "on its face" conveys the grant as originally located on June 17, 1863, *provided* the Court omits the particular description of the land contained in the deed, which describes an entirely different tract of land, viz. the amended location of 1866,—and the first prayer of the bill is, that the Court decree that that deed conveyed the original location of 1863. This result could only be arrived at by construction, and, as we have shown above (p. ) a court of equity has no power to construe a deed for such a purpose. If the Court had that power, it could only be exercised on the ground that the deed contained two descriptions of the land intended to be conveyed, one the true and sufficient description of the land,

the other a description that was superfluous, and that might therefore be rejected. But that is not the case made by this bill. The complainants allege in paragraph 8 that "the description by metes and bounds which has been omitted, and stars substituted in its place (that is, the description of the amended location of 1866) was used under *the mistaken belief existing at* the time said deed was made as to the metes and bounds of the tract." By reference to the preceding paragraph, the sixth, we learn that that *"mistaken belief"* existed at that time in the minds of the Land Office, the grantor and grantee.

Thus by the case made by the complainants' bill, the only construction that the Court could give to this deed of 1870 was by reformation or cancellation, because of "the *mistaken belief* existing at the time said deed was made as to the metes and bounds of the Float."

Since the complainants on the hearing introduced no proof of fraud, accident, or mistake in the making of the said deed, the Court below was without jurisdiction, and the bill should have been dismissed.

Assuming, however, that the Court below, sitting in equity, had jurisdiction to construe the said deed, and thus to create a legal title in the complainants by transmuting an equitable into a legal title simply by construction, it would have exhausted its power and jurisdiction in that suit by decreeing that remedy. The Court could not allow the complainants in the same suit to unite other matters, perfectly distinct and unconnected, against the same defendants; *Ex. gr.,* it could not in the same suit quiet the title to the land the legal title to which it had created in the complainants by its decree.

The Court says in Chapin v. Sears, 18 Fed., 814:

> "It appears from the prayer and the allegations of the bill that the complainant has filed it for two objects: (1) to determine and settle a legal title; and (2) for the partition of a tract of real estate. In other words, it asks the Court to ascertain who are

the owners of the property, and then to divide it according to the interests of the parties as determined."

The Court held the bill to be multifarious—

The objection of multifariousness, under the old practice, properly should have been made by demurrer, but the Court even then of its own motion might entertain such objection on the final hearing if embarrassment or confusion might result in executing the final decree.

*Story Eq. Pl.* §271, Note a, 10th Ed.
*Emans v. Emans,* 14 N. J. Eq. 118.
*Walker v. Powers,* 104 U. S. 250.

## POINT VI.

**The decree of the District Court being, in effect, by paragraph 6, that the tract of land here in litigation was segregated from the public domain of the United States on December 14, 1914; and the complainants having filed their bill on June 25, 1914, the bill should have been dismissed on the ground that while the fee simple title to and possession of the said land was in the United States, no suit could be brought by the complainants to establish their alleged legal title to the land.**

Legal title in the complainants being necessary in the courts of the United States to maintain a suit to quiet the title to land, the above statement of facts renders argument unnecessary under this point.

One additional consideration, however, presents itself. If the Court in such cases should assume jurisdiction, the decree of the Court would be an attempt to anticipate and instruct the future decisions of the Land Department as to which one of contending parties it should issue the patent for the land—a matter clearly beyond the equitable jurisdiction of the courts of the United States.

*Davidson v. Calkins,* 92 Fed., 238.
*Brandt v. Wheaton,* 52 Cal., 431.

## POINT VII.

**The only remedy for the complainants on the facts alleged in their bill would be, after December 14, 1914, to file their bill in equity to have the Court decree, that the person to whom the patent for Baca Grant No. 3 issued or enured on the said date, in this case, by the decision of the Supreme Court in Lane v. Watts, supra, the appellant, the Santa Cruz Development Company, the legal representative of the original grantees, the heirs of Luis Maria Baca, held the said land in trust for them.**

After the United States has parted with their title, and an individual has become vested with it, the equities subject to which he holds it may be enforced, but not before.

*Johnson v. Towsley,* 13 Wall. 72.
*Shepley v. Cowan,* 91 U. S. 330.
*Moore v. Robbins,* 96 U. S. 530.
*Marquez v. Frisbie,* 101 U. S., 473.
*Smelting Co. v. Kemp,* 104 U. S. 636.
*Steel v. Smelting Co.,* 106 U. S. 447.
*Monroe Cattle Co. v. Becker,* 147 U. S. 47.
*Turner v. Sawyer,* 150 U. S. 586.
*In re Emblon,* 161 U. S. 56.
*Michigan Land Co. v. Rust,* 168 U. S. 592-593.

In the last case, the Court say:

> "Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of legal title, * * * but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of patent. * * * After

the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings."

In *Marquez v. Frisbie, supra,* the Court say:

"We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States."

## POINT VIII.

**The right of the complainants below to demand this relief under the allegations of their bill, would rest upon an estoppel operated by the so-called title bond from John S. Watts to William Wrightson, dated February 2, 1863, in pursuance of which the said deed from said Watts to said Hawley, of January 8, 1870, is alleged to have been executed. But no estoppel was operated, because the complainants failed to prove on the hearing, that the said bond was assigned to their grantors or to them; or that the said deed of January 8, 1870, was executed in pursuance of said bond; or that by said bond or by said deed it was agreed by said Watts to convey, or that he conveyed, to the grantors of the complainants the legal title to the land here in dispute—the original location of Baca grant No. 3, of June 17, 1863.**

The consideration of this question is presented to the Court because counsel conceives it to be within the power of the Court in a suit of this nature to dispose of all questions of title that may arise in order to prevent a multiplicity of suits.

The Supreme Court says in *Camp v. Boyd,* 229 U. S. 551:

"A court of equity ought to do justice completely and not by halves. One of the duties of such a court

> is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

The complainants' future right to file a bill to ask that the appellants, the Santa Cruz Development Company, hold the land here in dispute in trust for them under the allegations of their bill, would rest upon the so-called title bond from said Watts to said Wrightson, and the deed of January 8, 1870, which they alleged, but did not attempt to prove on the hearing, was executed in pursuance of it. It is to demonstrate that no such right exists, and to have the Court now determine that fact, in order to prevent a multiplicity of suits, that argument under this point is presented.

Paragraph 9 of the Bill reads as follows, viz.:

> "The foregoing is the correct construction to be put on the deed of January 8, 1870, Exhibit 'A' (*i. e.,* that it conveyed Baca grant No. 3, as located on June 17, 1863) and is supported by the following facts. On or about March 2, 1863, the said John S. Watts executed and delivered to one William Wrightson a title bond for said Baca Float No. 3, and prior to January 8. 1870, the said Christopher E. Hawley had become entitled to and was in possession of said title bond, and entitled thereunder to have a fee simple title to Baca Float No. 3, as described in paragraph 2 hereof, made to him, and the plaintiffs, as successors in title to said Hawley, now own and possess said title bond."

The complainants alleged that this title bond was the foundation of their title to the land in dispute. It was of necessity, executory, and, to execute it, the plaintiffs allege Watts made to Hawley the deed of January 8, 1870. This terminated the life of the bond.

*Howes v. Barker,* 3 Johns. (N. Y.) 508, 509.

But this title bond is sought to be used not only to prove an agreement by Watts to convey lands to Wrightson, but to prove what lands he agreed to convey, while alleging that the conveyance was in pursuance to the bond. It cannot be used for such purpose.

Mr. SUGDON, in his work on Vendors, Vol. I, p. 496, Sect. 16 (Am. Notes by Perkins) says:

> "When a question arises as to what lands are conveyed to a purchaser, the previous contract is not admissible at law, although it expressly names the *locus in quo* as a part of the land to be sold.

Citing *Williams v. Morgan,* 15 Q. B. 782, the note of the American Editor reads: "The articles of agreement for the conveyance of land are generally merged in the deed made, delivered, and accepted in pursuance of them." Citing numerous cases.

See

*Dean v. Mason,* 4 Conn. Repts., 432, and cases cited.
*Parker v. Hains,* 22 How. 18.
*Hinde v. Longworth,* 11 Wheat. 214.
*Moran v. Prattier,* 23 Wall. 502.

But the futility of the assertion by the complainants, or by William Wrightson, of any claim of title to the land herein in dispute, the location of June 17, 1863, will become manifest by an examination and consideration of the title bond itself.

In the agreement of March 2, 1863, made by and between John S. Watts and William Wrightson, Watts recites that he is "the owner of one of the unlocated floats, containing about one hundred thousand acres of land, granted to the heirs of Luis Maria Baca by act of Congress approved 21 June, 1860."

Watts further recites that he "has full power and authority to make the location of said heirs under said act, and

cause to be made a title in fee for the same after such proper location and survey."

Admitting that Watts and his heirs would be estopped from denying the facts thus stated in this agreement, because the assumed existence of the facts recited formed the basis of the agreement, (*16 Cyc.* 719): yet, by the terms of the agreement itself, no estoppel could become operative against him and his heirs by reason of these recitals, until "after such proper location and survey," that is location by Wrightson, as will later be shown, and survey by the Government, of the location which the agreement purported to convey, and if the operation of the agreement was limited as to time by its terms, no estoppel could enure after the expiration of that time. *Smith, Leading Cases,* 710, Ed. 1866.

The agreement further recites: "Now therefore be it known that I, the said John S. Watts, have this day sold to Wm. Wrightson of the City of Cincinnati, State of Ohio, the said unlocated float, with all its privileges, for and in consideration of the sum of one hundred and ten thousand dollars, the receipt whereof is hereby acknowledged, and I hereby bind myself, my heirs, executors or administrators to make a full and complete title in fee simple for said land to said William Wrightson, his assigns or legal representatives, whenever thereunto required."

This was not a sale of land by Watts to Wrightson; it lacks every requisite of a deed for land; for it is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given in the instrument (*Chinoweth v. Haskell,* 3 Pet. 95). The same principle would, necessarily, and as against the creation of an estate by estoppel, be applicable to an agreement for a deed to land to be subsequently made, because that certainty and identity of description of the land, that are required by an estoppel would not exist (*Gilmer v. Poindexter,* 10 How. 267). Hence this agreement, if of any legal effect, was a sale by Watts to Wrightson of the use of a power in land which

had been granted by the Sixth Section of the Act of June 21, 1860, to the heirs of Baca, as in full recited by the agreement.

The agreement further recites "And I, the said John S. Watts, hereby authorize and empower the said W. Wrightson to make the location under the said Act in as full and ample manner as the said heirs could do the same."

From this paragraph, taken in connection with the preceding ones, the purpose and effect of the agreement becomes determined. Watts assigned to Wrightson the use of the power to locate one of the five floats, the power to locate which had been granted to the Baca heirs by the said Sixth Section of the Act of June 21, 1860, and authorized him to make such location "in as full and ample manner as the said heirs (of Baca) could do the same."

By this agreement and transaction, no legal title to any certain or specific land was conveyed, for nothing specific or certain was vested in Watts; and the power of locating was a power to locate in the name of the heirs of Baca, not in that of Watts or Wrightson (*Gilmer v. Poindexter,* 10 How. 166). The location was to be made by Wrightson and not by Watts; the latter nowhere agrees that he will make it, or cause it to be made; and it is not needful for the proper execution of the power, that such an agreement should be imported into the contract. What Watts did agree to do was to "cause to be made a title in fee simple for the same" "after such proper location and survey," that is, proper location by Wrightson, in the name of the heirs of Baca, and survey of such location by the Government.

If the Baca heirs should have, subsequent to this agreement, located in their own name, any or all of these five floats, the right to locate which had been granted to them by the sixth section of the Act of June 21, 1860; and should now a patent be issued to them for one or all of such floats, or to John S. Watts, or the heirs of Watts, as purchasers of one or more of these locations from the heirs of Baca, at a time subsequent to the dates of this agreement, no

legal title by estoppel would enure to Wrightson, or to his legal representatives by reason of the acquisition of such title. *Gilmer v. Poindexter,* 10 How. 267.

In this case the Court say:

> "But we are of opinion that in this instance no estoppel has been operated. This legal effect can occur only where a party has conveyed a precise or definite legal estate, by a solemn assurance, which he will not be permitted to vary or deny. It can have no operation to prevent the denial of an equitable transfer of title, which is not identical with the legal title or muniment of title, which it may be relied on either to establish or protect."

Further, the power to locate which was assigned to Wrightson by the agreement, was limited by the instrument, and by the sixth section of the statute of June 21, 1860, which was therein recited, to three years after the approval of the statute, to wit, June 21, 1863. It was not proved on the hearing that within that time Wrightson exercised the power to make the location of one of the five floats, and consequently the power lapsed. By his laches, Wrightson forfeited all rights under the agreement between Watts and himself. He, and his assigns, and legal representatives are without remedy at law, and equity will not interfere where there has been a non-execution of a power. *Story Eq. Juris.* Sec. 169.

On June 17, 1863, the heirs of Baca, by John S. Watts their attorney, located Baca Float No. 3, the lands here in dispute, in Pima County, Arizona, and about the same time they located, through Watts as their attorney, Baca Float No. 5 in Yavapai County, Arizona.

On May 1, 1864, some of the heirs of Baca quit claimed to Watts, Baca Locations Nos. 2, 3 and 4 "for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further

consideration of three thousand dollars paid by the said John S. Watts."

On May 30, 1871, the heirs of Baca "granted to Watts Baca Location No. 5; and ratified and confirmed the title made by them to Watts on May 1, 1864, to Locations Nos. 3 and 4 in said deed of May 1, 1864, mentioned and described," that is the location of June 17, 1863.

It was contended by the complainants that the agreement between Watts and Wrightson of March 2, 1863, was a "title bond" by which Watts sold Baca Float No. 3 to Wm. Wrightson, and "bound himself, his heirs, executors or administrators to make full and complete title in fee simple to said Wm. Wrightson, his assigns or legal representatives whenever thereunto requested."

Assuming, for the sake of argument, that the agreement of March 2, 1863, was a "title bond," it was not a title bond for "Baca Float No. 3" as is contended, but what it purported to sell was "the said unlocated float with all its privileges", and as a "title bond" it would be void for uncertainty. The rules of law applicable to a deed for land are applicable to an agreement for such a deed. Mr. Washbourne (on Real Estate) says at Sec. 2289, "A description of the thing granted is of course a most important part of a deed, as its purpose is to identify that upon which other clauses of the deed are designed to operate; and if the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case."

In the same paragraph, the ninth, it is alleged that the said Watts fulfilled his said contract with Wrightson by executing the deed of January 8, 1870, to Christopher E. Hawley.

The complainants below not having proved on the hearing, that by the said title bond and the deed of January 8, 1870, alleged to have been executed in pursuance of it, the legal title to the land in dispute was vested in them; that title, as between them and the appellants, the Santa

Cruz Development Company, was in the said company as the legal representative of John S. Watts.

In truth, this fact is pleaded by the complainants in paragraph 12 of their bill, where they allege that:

> "By the title bond hereinbefore referred to, all the heirs of Luis Maria Baca, or of John S. Watts, held the title, if any remained in them, in view of the deeds of May 1, 1864, and of May 30, 1871, and of January 8, 1870, hereinbefore referred to, in trust for the said Christopher E. Hawley, and his successors in title, including the plaintiffs."

If the appellant, the Santa Cruz Development Company, as the successor of John S. Watts, thus holds the title to the land in dispute in trust for the complainants below, as the bill alleges, it must hold it as the owner of the legal title; and if the said complainants can show a better right, a Court of Equity will, as above shown, convert the company into a trustee, and compel it to convey the legal title. But, under these circumstances, the court will not in the same suit, or in this suit, quiet the title to the said land.

This twelfth paragraph of the complainants' bill of complaint furnishes another instance of its multifariousness. It not only seeks (1) to reform the deed because of mistake; to (2) construe the said deed, and (3) upon such construction to have the court quiet the title thus created, but (4) the complainants allege that, in any event, the legal title to the land is held in trust for them by the successors in title to the heirs of the original grantee, Luis Maria Baca.

## POINT IX.

**The said deed of January 8, 1870, conveyed to the said Hawley no right, title or interest to the original location of Baca grant No. 3, of June 17, 1863, by reason of the fact that the tract of land—the attempted amended location of 1866—particularly described in said deed, to some slight extent overlaps the original location of June 17, 1863, to which the grantor, Watts, then had the legal title.**

It will be found by reference to the map showing the location of 1863, and the attempted amended location of 1866 of Baca grant No. 3 (R. 379) that the latter overlaps the former to some slight degree at the northeast corner. From this fact it may be argued that the deed of January 8, 1870, from Watts to Hawley, in any event, conveyed to the latter the land embraced within the overlap to which Watts then had the legal title.

Evidently, no one but the successors in title to Hawley, Messrs. Watts and Davis, the complainants below, can make such claim—and it cannot be made by them on the allegations of their sworn bill of complaint. By paragraphs 7, 8 and 9 of their bill they allege that there was no tract of land such as is described by the attempted amended location of 1866; that such description was inserted in the said deed of 1870 by mistake, and that when Watts executed said deed to Hawley, he intended to and did, convey the original location of 1863, and not the attempted amended location of 1866, therein particularly described by metes and bounds.

The court, so far as the complainants below are concerned, must construe the deed according to the allegations of their bill.

Section 2 of the Arizona statute regarding conveyances (Sec. 2050, Civil Code, 1913) has no application to this case. It contemplates the intention of the grantor to

convey an estate in land to which he had title, and, in the expression of that intent by deed, he conveys not only that estate, but also a larger one to which he has no title. The statute simply provides that the deed shall be construed to convey the smaller estate to which the grantor had title.

## POINT X.

**The instrument of writing executed by and between the heirs of John S. Watts and David W. Bouldin, dated September 30, 1884, under which James E. Bouldin, Jennie N. Bouldin, Joseph E. Wise, Lucia J. Wise, and W. G. Rifenburg, defendants below, claim title to the land in dispute, was not a deed but an executory contract, and being a contract that related solely to property which had no actual or potential existence, it was nudum pactum and void.**

There is nothing contained in this document that would lead the court to construe it as a deed *in praesenti,* excepting the use of the words of conveyance "grant, bargain and sell."

The rule of law is that the intent of the parties is to be ascertained from the whole instrument. It is thus stated in *Devlin on Deeds,* Sec. 7—

> "The strongest words of conveyance in the present time will not pass an estate, if from other parts of the instrument a contrary intent be apparent. * * * Enough formal and apt words may be used in a deed, yet, if it be apparent from the other parts of the instrument, taken and compared together, that all that was intended was a mere agreement for a conveyance, the intention shall prevail."

*Jackson v. Clark,* 3 Johns, R. 424.
*Jackson v. Myers,* 3 Johns. R. 383.
*Atwood v. Cobb,* 33 Mass. (16 Pick.) 229.
*Williams v. Payne,* 169 U. S. 55.

*Taylor v. Burns,* 203 U. S. 120.
*Chavez v. Bergere,* 231 U. S. 482.

If this instrument had any validity, it was as an executory contract. It did not purport to create in Bouldin a power in land coupled with an interest, but an interest to be produced by the exercise of the power granted (*Hunt vs. Rousmaniere,* 8 Wheat. 203). It was void whether regarded as a contract or as a deed—for the property described in it had no actual or potential existence, and the consideration to be performed regarding such property was impossible of performance.

By this instrument, *which was executed by both the heirs of Watts and Bouldin,* the former "granted, bargained and sold" to the latter Baca Location Nos. 2, 3 and 4. The heirs of Watts had no title to Locations 2 and 4, and as to Location No. 3, the instrument recited:

> "Also Location No. 3, which was also located under and by virtue of the aforesaid 6th section of an act of Congress passed June 21, 1860. Said location was heretofore duly surveyed in accordance with the provisions of said act, and the field notes returned to the proper office, but the surveyor general disapproved the same, as being located on mineral land. Said location is described as follows;"

giving a description by metes and bounds of the location of June 17, 1863.

Evidently from this recital, *which is that of both parties,* the estate in Baca Location No. 3 which was intended to be conveyed was understood to be an equitable and not a legal one.

This is made more manifest from the consideration moving from Bouldin which is thus stated:

> "And for the further consideration, covenants and agreements to be performed by the party of the second part (Bouldin) as hereinafter mentioned, and for the purpose of compromising and settling the claims of

title between the parties of the first and second parts, and of *perfecting and quieting the title to the lands hereinafter described.*"

In the instrument it was further covenanted and agreed:

"And also, if in *perfecting the title to Location No. 3* above described, other lands or land certificates shall be granted by the United States government, in lieu thereof, then in that event, the parties of the first part hereby bargain, sell, grant, and convey to the party of the second part an undivided two-thirds of such other lands or land certificates as may be received by them in lieu of the lands aforesaid."

Bouldin further covenants to use due diligence in prosecuting these claims, at his own cost and charge,

"and also to the *perfecting of the title to Location No. 3,* above described, from the government of the United States, or acquiring other lands or land certificates in lieu thereof, if the same can be recovered from the government of the United States."

The Watts heirs constituted Bouldin their attorney in fact to carry out the object of the agreement.

The heirs of John S. Watts had, when they executed this agreement, an indefeasible, legal title to this grant, Baca Location No. 3, as located on June 17, 1863, the reversion of the legal title to the United States having been destroyed by the action of the Commissioner of the Land Office on April 9, 1864 (*Lane vs. Watts,* 235 U. S. 20), and the United States retained the strict legal title and possession until the issuance to the heirs of a patent, or its equivalent, the issuance of which they could not control (*Gibson vs. Chouteau,* 13 Wall. 100) and which, most certainly, Bouldin under this contract could not compel; and, therefore, there was no imperfect title to the grant that could be "perfected" or "quieted" by any effort or action by D. W. Bouldin. This alleged imperfect title had no exist-

ence, either actual or potential. It could not be made the subject of contract or grant, for to make a contract or grant valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant (*2 Kent's Com.* 468; *Story Eq. Jurisp.,* sec. 1040; *Tiedman on Real Prop.,* sec. 799; *Mitchell vs. Winslow,* 2 Story, 368; *Jones vs. Richardson,* 10 Metc. (51 Mass.), 488; *Pennock vs. Coe,* 23 How. 127). This instrument conveyed nothing; it was a contract about nothing; a "mere scrap of paper."

Consequently, there was no Baca Location No. 3, the title to which Bouldin under this contract could "quiet" or "perfect"; there were no other lands or land certificates to be acquired by Bouldin in lieu thereof from the government of the United States; there was no great diligence that Bouldin could exercise, nor sums of money that he could expend in doing—nothing. The agreement was *nudum pactum,* it was impossible of fulfillment; it was void both at law and in equity.

Mr. Pollock in his work on Contract, on page 400, says:

> "On the first and simple rule—that an agreement impossible in itself is void—there is little or no direct authority, for the plain reason that such agreements do not occur in practice, but it is always assumed to be so."

Notwithstanding "such agreements do not occur in practice," here we have one. And notwithstanding all the transparent circumstances of doubt and illusion surrounding this transaction, Bouldin in 1885 succeeded in selling to Messrs. Ireland and King a one-third interest in this agreement, and they, in turn, unloaded it on the defendant, Joseph E. Wise, who, in his answer filed in this case, alleges that under this agreement, and the purchase by him at Sheriff's sale of all the interest of D. W. Bouldin in Baca Location No. 3, he is seized of the legal title to an undivided two-thirds interest in the land here in controversy. Mr. Wise took nothing by either instrument.

## POINT XI.

**The grant from the United States to the heirs of Luis Maria Baca by the sixth section of the Act of June 21, 1860, was exclusively to "the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas," and did not embrace heirs of said Baca who did not "make claim" to the surveyor general of New Mexico, or to Congress pursuant to the provisions of the statute of September 30, 1854.**

This point has been fully discussed in a separate brief filed by the counsel of the respective parties appealing from so much of the decree as awarded an undivided 1/38 of the grant to Joseph E. Wise and Lucia J. Wise respectively, and here needs no further consideration.

**The decree of the Court below should be reversed and the bill of complaint dismissed with costs; and judgment should be entered for the appellant, the Santa Cruz Development Company, on their answer and cross bill for Baca grant No. 3, as located on June 17, 1863, and quieting their title to the said tract of land against the claim of the other parties to this suit.**

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Santa Cruz Development Company.